



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL CASE NO. 92 OF 2001

**EUNICE WAMBUI MBOGO.....1ST
APPLICANT**

GIDRAF MBOGO BABU.....2ND APPLICANT

VERSUS

**ESTHER NYAMBURA
MBOGO.....RESPONDENT**

(Being an appeal from the Judgement of Ndungu H. N. (Miss), Senior Resident Magistrate, in Kengema Senior Resident Magistrate's

Civil Case NO. 33 of 1994 delivered on 8th March 1995 at Kangema)

RULING

Pursuant to the provisions of *Order XLI rule 16* of the Civil Procedure Rules (old) and *Section 1A* of the Civil Procedure Act, Gidraf Mbogo Babu, the 2nd Appellant/Applicant herein, took out the Motion dated 29th September 2010 in which he applied for the order dismissing the appeal for want of prosecution issued on 31st October 2008 set aside. The Motion is supported by the affidavit of the applicant. The Motion was served but it attracted no response from Esther Nyambura Mbogo, the respondent herein. A hearing notice for 28th March 2011 was also served. Again, the Respondent did not deem it fit to attend court for the interpartes hearing of the Motion. This court granted the Applicant leave to proceed exparte when it became apparent that the Respondent had failed to attend court to oppose the Motion.

It is the submission of the Applicant that he did not know that the appeal had been dismissed until she was served with the application dated 21st July 2010. The Applicant blamed the firm of Kamau Kinga & Co. Advocates for the delay in prosecuting the appeal. He claimed that the aforesaid firm of Advocates

failed to inform him of the progress of the Appeal despite making several visits to their offices. The Applicant learned from a friend that his case was being mentioned before the Kangema Court on 1st September 2010. It is when he obtained the cause list for that court for 1st September 2010 that he learned that the appeal herein had been dismissed for want of prosecution. The Applicant averred that at the time of the dismissal of his appeal, Mr. Daniel Ndungu his learned advocate was behind bars. The applicant beseeched this Court not to punish him for the mistakes of his erstwhile advocate.

I have considered the grounds set out on the face of the Motion plus the facts deponed in the supporting affidavit. This dispute appears to have began when Esther Nyambura Mbogo, the Respondent herein, filed Kangema R.M.C.C.C. No. 33 of 1994 against Gidraf Mbogo Babu, the 2nd appellant/Applicant and the late Eunice Wambui Mbogo. In the aforesaid Complaint, the Respondent sought for judgment in the following terms *inter alia*:

(a) A declaration that the parcels of land known as LOC. 12/Sub. Loc. 4/1166 is a trust land.

(b) An order against the co-defendants to effect transfer of three acres from Loc. 12/Sub-Loc. 4/1166.

The 2nd Appellant opposed the suit by filing a defence. The suit was heard by Ndungu H. N. the then learned Senior Resident Magistrate. In her judgment delivered on 8th March 1995, the learned Senior Resident Magistrate gave judgment in favour of the Respondent. She directed that the land in dispute to be shared equally between the 2nd Appellant herein and the Respondent. She also declared that the 1st Appellant should have life interest. She also declared the existence of a trust. The Appellants were aggrieved hence they preferred this appeal. The Appeal was filed on 8th June 2001. The record shows that the 1st Appellant, Eunice Mbogo died on 25th June 2002 hence her appeal must have abated as of 26th June 2003. The record shows that this Court served a notice to show cause under *Order XLI rule 31 (2)* of the Civil Procedure Rules on the firm of D. Ndungu & Co. Advocates. The Notice to show cause was fixed for 31st October 2008. On the aforesaid date the appeal was dismissed for want of prosecution. The 2nd Appellant is now before this Court, seeking for the appeal to be reinstated and re-admitted for hearing. He has solely blamed his advocate for the dismissal of the Appeal. I do not think the provisions of *Order XLI rule 16* of the (old) Civil Procedure Rules apply to this application. Perhaps the most relevant provision to be applied in this case is Section 1A of the Civil Procedure Act. The law is silent as to what steps should an aggrieved party take upon the dismissal of an Appeal under *Order XLI rule 31 (2)* of the (old) Civil Procedure Rules. In my view, in such a scenario, a party can approach the Court under *Sections 1A and 3A* of the Civil Procedure Act. In the matter before this Court, the 2nd Appellant has urged this Court to re-admit the appeal to enable him ventilate his claim. The overriding objective of the Court is to ensure that disputes are determined in a just manner. The appeal was dismissed for want of prosecution. The 2nd Appellant has shown that his erstwhile advocate was to blame. I will not allow a party to suffer for the mistakes of his advocate. I will re-open the window of justice to enable him fully argue his case. I hereby set aside the order dismissing the appeal and direct that the appeal be re-admitted to hearing. Costs of the Motion to abide the outcome of the Appeal.

Dated and delivered at Nyeri this 17th day of June 2011.

J. K. SERGON

JUDGE

No appearance of the parties with Notice.
Delivered in open court.